

**2015 BOC Athletic Trainer  
Regulatory Conference**



# **Top Ten Regulatory Disciplinary Cases Regulators Need to Know About**

Amigo R. Wade, Senior Attorney  
Virginia Division of Legislative Services



## Background

- **Ten decisions from jurisdictions in the United States and Canada**
- **Different regulatory bodies**
- **Variety of regulatory actions**
- **Poll question for each case**
- **PLEASE RAISE YOUR HAND!!!**





1. **North Carolina Board of Dental Examiners v. Federal Trade Commission, 574 U.S. \_\_\_\_ (2015)**
2. **Kelly v. Ontario College of Physicians and Surgeons, 2014 ONSC 2824**
3. **Jain v. Delaware Board of Nursing, 72 A3d 501 (2013)**
4. **Yazdanfar v. Ontario College of Physicians and Surgeons, 2013 ONSC 6420**
5. **Hagen v. Iowa Dental Board, 839 N.W.2d 676 (2013)**
6. **Merchant v. Law Society of Saskatchewan, 2014 SKCA 56**
7. **Oni v. Tennessee Department of Health and Tennessee Board of Medical Examiners, 2013 Tenn. App LEXIS 467**
8. **Sobeys West v. College of Pharmacists of British Columbia, 210 BCSC 1414**
9. **Denuit v. Ohio State Board of Pharmacy, 994 N.E.2d 15 (2013)**
10. **Barletta v. Harry Rilling, Chief of Police for the City of Norwalk, Case No. 3:11-cv-00990**



## **North Carolina Dental Examiners v. FTC**

- **Board composed of six dentists in active practice, one hygienists, and one public member**
- **Dentist members are elected by dentists**
- **Board received complaints regarding non-dentist providing teeth whitening services**
- **Issue-> unauthorized practice of dentistry?**





## **North Carolina Dental Examiners v. FTC**

- **After investigation, sent “Cease and Desist” letters to the teeth whiteners, their suppliers, and mall owners**
- **Also had the Cosmetology Board inform its licensees**
- **FTC brought an action alleging violation of antitrust laws**



## **Session Poll Question #1**

**Should state professional licensing boards that include a controlling number of active market participants be subject to federal antitrust laws?**

- **A – Yes**
- **B – No**
- **C – Should be decided on a case-by-case basis**



## North Carolina Dental Examiners v. FTC

- Certain forms of state actions have immunity from antitrust laws
- When a controlling number of a board consists of active market participants the board must be actively supervised by the state
- Dissent- professional regulation is exclusively the purview of sovereign state governments



## **Kelly v. Ontario**

- **Wanted to use a copy of an illegally obtained hard drive containing child pornography in the possession of the police at a discipline hearing.**
- **Police seized hard drive on basis of invalid warrant. For that reason, criminal charges were withdrawn.**
- **Kelly went to court to have the drive destroyed or declared inadmissible.**





## Session Poll Question #2

**Should illegally obtained evidence be admissible at a regulatory board hearing?**

- **A – Yes**
- **B – No**





## Kelly v. Ontario

- The Court refused to order the destruction of the evidence because it could be admissible in the discipline proceeding.
- The Court held it was for the Discipline Committee to decide whether the evidence should be admitted.





## **Jain v. Delaware Board of Nursing**

- **Charged with failing to properly assess the medical condition of a patient**
- **Found that although the nurse's actions did not contribute to the patient's death, she was negligent**
- **Position: Board rules, unlike common law negligence, do not require causation as an element of negligence.**



## **Session Poll Question #3**

**Should every finding of negligence be required to include evidence that the negligent conduct caused harm?**

- **A – Yes**
- **B – No**







## **Jain v. Delaware Board of Nursing**

- **The record establishes that under the Board's rules, Jain had a duty to her patient that was breached when she failed to physically examine the patient**
- **The failure to act was sufficiently negligent to be a professional violation without a showing that the conduct resulted in harm to the patient**
- **Board decision upheld**



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## Yazdanfar v. Ontario

- **Family medicine physician performing cosmetic surgery prosecuted following the death of a patient after a liposuction procedure.**
- **Case raises numerous issues, including use of compelled statements and whether the penalty was appropriate.**





## **Session Poll Question #4**

**Can a compelled statement obtained during the investigation be used against the regulant in a subsequent board disciplinary hearing?**

- **A – Yes**
- **B – No**



## **Yazdanfar v. Ontario**

- **Physician found in violation; decision upheld by Court**
- **A compelled statement obtained in the course of investigation by a regulator can be used in the ultimate discipline hearing**
- **Treating discipline hearing as separate proceeding would undermine purpose of regulatory framework**







## **Hagen v. Iowa Dental Board**



- **Initially issued license in 1996**
- **Dental licenses expire on 8/31 in even numbered years; sixty day grace period**
- **After grace period, the board considers a license lapsed and invalid**
- **Hagen asserts renewal mailed on 8/30; Board had no record of receiving renewal**



## Session Poll Question #5

**Should a regulant with a lapsed license be charged with engaging in unlicensed practice if the regulant believed the license had been validly renewed and can produce evidence supporting that belief?**

- **A – Yes**
- **B – No**





## Hagen v. Iowa Dental Board

- Board required to find only two elements, that Hagen engaged in the practice of dentistry after failing to renew his license
- Board not required to find that Hagen subjectively knew that he failed to renew his license
- Hagen violated the law whether he knew it or not



## Merchant v. Law Society of Saskatchewan

- Lawyer represented client in settlement of a civil claim; also represented client in a child support matter
- Court order required client and firm to pay portion of settlement funds into court to cover child support.
- Lawyer set up a scheme to side step order- funds paid directly client and no money paid into court



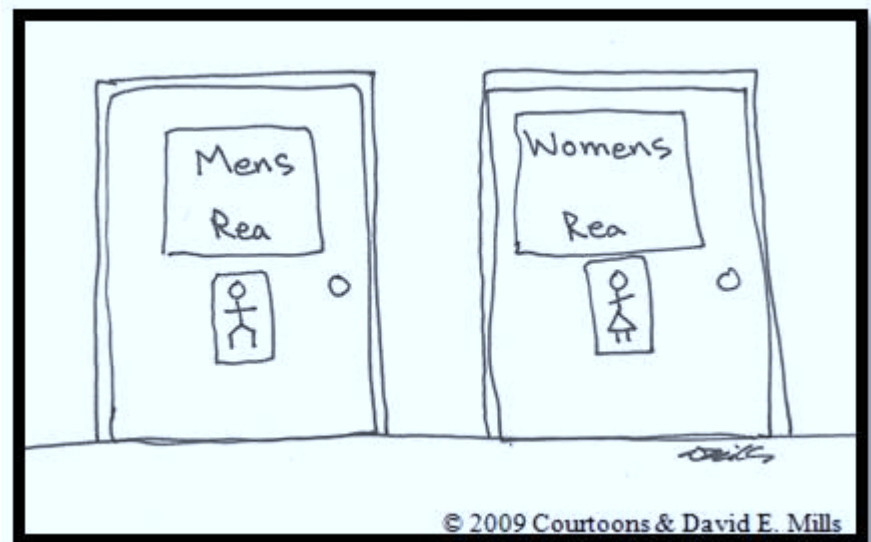




## Session Poll Question #6

**Is mens rea (intent) required to prove offence of professional misconduct?**

- **A – Yes**
- **B – No**
- **Sometimes**





# **Merchant v. Law Society of Saskatchewan**

- **Lawyer found in violation; finding upheld on appeal.**
- **Professional misconduct is generally a strict liability offence- not required to establish intent.**
- **Regulations may provide for intent (i.e. that conduct was done “knowingly,” “willfully,” or “intentionally”)**



# Oni v. Tennessee Department of Health

- Licensed in Tennessee and New York
- New York license revoked
  - Information provided on renewal application
    - ✓ Disciplinary action in another state
    - ✓ Willfully making or filing a false report
- Tennessee license revoked based on the New York disciplinary action; Oni appealed
- Lower court vacated revocation





## Session Poll Question #7

**If a professional license is revoked in one state, should it automatically be revoked in all other states in which the individual is licensed?**

- **A – Yes**
- **B – No**







## **Oni v. Tennessee Department of Health**

- **The board did not articulate why revocation was appropriate.**
- **By simply mirroring the New York board's choice of discipline, the decision was arbitrary and capricious.**
- **Remanded to the Board to reconsider the sanction**



# Sobeys v. College of Pharmacists of B.C.

- College of Pharmacists established a rule prohibiting customer incentive programs as not in the public interest
- Sobeys West, Inc. is a retail grocery chain
- Challenged the provision





## Session Poll Question #8

**Should pharmacies be permitted to offer customer incentive programs?**

- **A – Yes**
- **B – No**





## **Sobeys v. College of Pharmacists of B.C.**

- **The Court struck down the rule as unreasonable**
- **The Court also held that the rule was overly broad**
- **Effect of the rule is actually harmful to the public interest in obtaining pharmacy services and prescriptions at the lowest price”**





## Denuit v. Ohio State Board of Pharmacy

- Board disciplined Denuit for fondling a female co-worker
- Behavior constituted “gross immorality”
- Denuit appealed; Court found Board’s standard for defining “gross immorality” was impermissibly vague
- Board appealed





## **Session Poll Question #9**

**Should a statute or regulation making gross immorality a cause for disciplinary action include a specific definition of “gross immorality”?**

- **A – Yes, without a definition it would be too vague**
- **B – No, the determination should be left to the Board**



## **Denuit v. Ohio State Board of Pharmacy**

- **A statute is not unconstitutional because it does not define a relevant statutory phrase**
- **In this case the meaning is clear and can be ascertained from a dictionary**
- **Board finding that Denuit's actions constituted gross immorality is supported by the evidence**



## Barletta v. The City of Norwalk



- **Convicted of dealing narcotics in 2006, served three years of sentence**
- **Applied for license as a precious metals dealer in 2009**
- **License denied based on state law barring convicted felons from holding a license as a precious metals dealer**





## Session Poll Question #10

**Should an individual with a past criminal record be prohibited from receiving a professional license?**

**A- Yes**

**B- No**

**C- Yes, if the previous criminal activity has a connection to the regulated activity**





## **Barletta v. The City of Norwalk**

- **Appealed alleging due process and equal protection violations**
- **Holding: Unconstitutional**
  - ✓ **No rational connection to the stated purpose of the law, which is the prevention of fraud**
  - ✓ **Cannot substitute a felony conviction for individualized consideration**

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## Thank You!

**Amigo R. Wade**

**201 North 9th Street, 2<sup>nd</sup> Floor**

**General Assembly Building**

**Richmond, VA 23219**

**(804) 786-3591, Ext. 216**

**[awade@dls.virginia.gov](mailto:awade@dls.virginia.gov)**